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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ...1384

BUTELL ROBINSON and DONALD ROBINSON,
Petitioners,

versus

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Respondent.

EDWARD R. BREEDLOVE,
Petitioner

versus

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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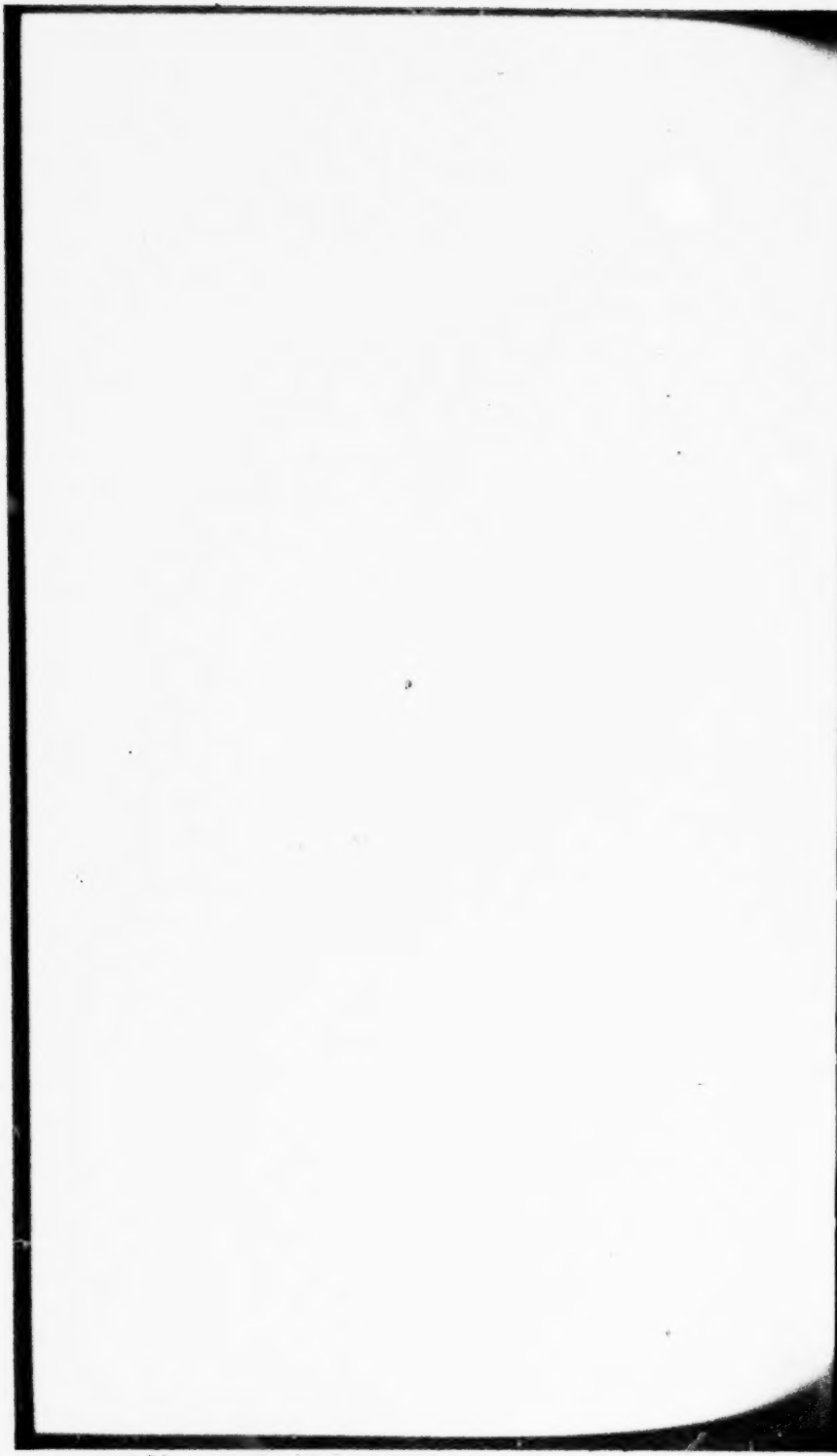

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To the United States Court of Appeals for the Fifth Circuit

Butell Robinson and Donald Robinson, and Edward R. Breedlove, your petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 4, 1970.

OPINIONS BELOW

The opinion of the District Court, in reality an order granting a Summary Judgment (R. 80), has not been reported. Copy is appended hereto as Appendix I.

The opinion of the Court of Appeals has not been reported. A copy is appended hereto as Appendix II.

JURISDICTION

The judgment of the Court of Appeals (R. 100) was entered February 4, 1970. A Petition for Rehearing (R. 102) was denied March 3, 1970 without opinion.

Jurisdiction to issue the Writ is invoked pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

Federal jurisdiction was invoked initially by petitioners at the time of filing their original complaints on the grounds of diversity of citizenship and amounts involved pursuant to the provisions of Title 28, Section 1332 (a) (1), United States Code.

QUESTION PRESENTED

Whether a Certificate of Convenience and Necessity, granted by the Federal Power Commission, is a condition precedent to exercise of the right of eminent domain by an interstate pipeline company subject to the Natural Gas Act [Title 15, Section 717, et seq.; U. S. C. A.]?

STATUTES INVOLVED

The specific United States statute involved is **Title 15, Section 717f, United States Code,** which provides inter alia

> "(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in

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the transportation or sale of natural gas, subject to the jurisdiction of the commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the commission authorizing such acts or operations;

* * * * * * *

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipeline or pipelines for the transportation of natural gas . . . it may acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such property may be located, or in the State courts. . . ."

The Georgia statute, which has been held herein to be applicable, is **Georgia Code, Section** 36-201.1:

"**Power of eminent domain conferred upon pipeline carriers of natural or artificial gas**—The power of eminent domain is hereby granted to and conferred upon persons who are or may be engaged in constructing or operating pipelines for the transportation and/or distribution of natural or artificial gas; and upon persons who are or may be engaged in furnishing natural or artificial gas for heating, lighting, and/or power purposes in the State of Georgia."

STATEMENT OF THE CASE

On or about October 29, 1964, Respondent caused a surveyor and two helpers to enter upon lands of Petitioners located in Gwinnett County, Georgia, survey a route for the center line of a right-of-way for a pipeline over

said lands, and cut bushes, small trees, and other undergrowth and plants growing thereon (R. 74).

Thereafter, on or about December 23, 1964, Respondent alleging that it ". . . is a natural gas company as defined by the Natural Gas Act and . . . transports gas in interstate commerce . . ." instituted proceedings in the Superior Court of Gwinnett County, Georgia, to condemn and acquire by eminent domain a right-of-way and easement for a pipeline through the same lands of Petitioners (R. 45-46). This proceeding was commenced pursuant to **Georgia Code Section** 36-201.1.

Notice of intention to condemn was served upon Petitioners requiring their appearance in the chambers of Honorable Charles C. Pittard, Judge of the Superior Court of Gwinnett County, Georgia (R. 57). When Petitioners appeared they were not represented by counsel, but Judge Pittard stated to them the right of Respondent to condemn their property was absolute, they could not contest its right to condemn, and the only remedy open to them was the naming of an assessor inasmuch as the only matter to be determined was the value of the property to be taken (R. 74-75).

The assessors made awards to Petitioners from which respondent appealed as provided by the Georgia statute (R. 34-35). The amounts of the awards were paid to Petitioners as required by the statute (R. 67). Thereafter, respondent entered upon property of the Petitioners with grading, ditch digging, and other large machinery, and uprooted trees, cut fences, tore up pasture and grazing lands, drained a small lake or fish pond on the premises of one of the Petitioners, dug trenches, laid lines of pipe therein, and began the transmission of natural gas through their property (R. 8).

Petitioners employed counsel and on December 1, 1966, defensive pleadings, consisting of answer and motion to

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dismiss, were filed in the actions (R. 32-33). Respondent moved to strike the answers of petitioners (R. 25-26) and on July 11, 1967, order was entered overruling Petitioners' motions to dismiss but striking their answers (R. 24).

On April 14, 1967, Petitioners, in response to a letter written to the Federal Power Commission, learned for the first time that the condemnation proceeding had been instituted by respondent against them without obtaining a Certificate of Convenience and Necessity from the Federal Power Commission as contemplated by Section 7 (c) of the Natural Gas Act, and that such certificate was not granted to respondent until September 9, 1966. The Motions to Dismiss, filed by Petitioners and overruled by the Court, urged the non-existence of a Certificate of Convenience and Necessity (R. 33).

Petitioners then instituted action in the United States District Court for the Northern District of Georgia by verified complaint (R. 3-12) reciting the facts hereinbefore stated, alleging the condemnation action pending in the Superior Court of Gwinnett County, Georgia, had been calendared for trial and disposition during the week of October 16, 1967, offered to restore to Respondent the amounts awarded by the assessors either by deposit in the registry of the Court or as might otherwise be determined to be appropriate, prayed the recovery of $100,000.00 as damages, restraint of Respondent from further prosecution of the condemnation action, and general relief (R. 11-12).

Respondent answered (R. 13-20), asserting various defenses including failure to state a claim upon which relief can be granted, laches, estoppel, waiver, res judicata, the existence of a Certificate of Public Convenience and Necessity granted by the Federal Power Commission under Section 7 (c) of the Natural Gas Act prior to any actual

said lands, and cut bushes, small trees, and other undergrowth and plants growing thereon (R. 74).

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entry upon the land of the plaintiff the inhibitions of Title 28, Section 2283, United States Code, with respect to the enjoining of state court proceedings by a federal court, and a formal reply to the complaint admitting certain allegations, denying others, and exhibiting therewith portions of the proceedings in the Superior Court of Gwinnett County, Georgia (R. 21).

Thereafter Respondent moved for a summary judgment which, as hereinbefore noted, was granted (R. 80-97), and upon review the Fifth Circuit Court of Appeals affirmed (R. 100).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals, by its decision in the instant case, has ignored the clear, unequivocal language of the Natural Gas Act, **Title 15, § 717f(c), USCA**, requiring that there be

> ". . . in force with respect to such natural gas company a Certificate of Public Convenience and Necessity issued by the commission authorizing such acts or operations;"

before an interstate pipeline company is authorized to exercise the right of eminent domain;

II. The Fifth Circuit Court of Appeals, by its decision in the instant case, has ignored the clear, unequivocal language of the Natural Gas Act, **Title 15, § 717f(h), USCA**, conferring the right of eminent domain only upon

> ". . . any holder of a Certificate of Public Convenience and Necessity . . ."

III. The decision of the Fifth Circuit Court of Appeals in the instant case judicially approves the complete frustration of the scheme of regulation of interstate pipeline companies established by Congress in enactment of the Natural Gas Act, **Title 15, § 717f, USCA**, in that inter-

state pipeline companies may utilize state eminent domain statutes without obtaining a Certificate of Convenience and Necessity and never submit the matter to the Federal Power Commission for determination.

I

The Natural Gas Act Has Been Ignored

The Fifth Circuit Court of Appeals failed to follow the specific language of the Natural Gas Act, Title 15, Section 717f(c), USCA, which provides:

> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, **unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.**" [Emphasis supplied.]

Whether commenced in a Federal Court or a State Court, a pipe line company subject to the Natural Gas Act asserts **federally** created rights. **Authority** to condemn private property for pipe line purposes is conferred **only** upon the holder of a certificate of convenience and necessity granted by the Federal Power Commission pursuant to the Natural Gas Act, and particularly that portion of same quoted above.

Indeed in previous decisions the Fifth Circuit Court of Appeals had itself so held. One such is **Thatcher v. Tennessee Gas Transmission Co.**, 5 Cir., 180 F. 2d 644, and from which we quote:

"Indeed when Congress determined it in the public interest to regulate the interstate transportation and interstate sale of natural gas as provided by the Act of 1938 and the amendment of 1942, so that companies engaged in such business not only could not operate except under the authority provided by the statute, but could also be required to provide additions and extension of service, it was proper to make provision whereby the full statutory scheme of control and regulations could be made effective, by **the grant to such company of the right of eminent domain. The possession of this right** could well be considered necessary to insure ability to comply with the Commission requirements as well as with all phases of the statutory scheme of regulation."

* * * * * * * *

"If our conclusions are sound, and we think there can be no valid doubt as to this, it must be deemed established that the grant of the power of eminent domain provided by the Natural Gas Act is a regulation of interstate commerce by Congress and not the equivalent of engagement in such commerce as contended by the appellant."

When Respondent commenced proceedings against Petitioners in the Superior Court of Gwinnett County it was asserting a non-existent right because at that time **authority** to condemn had not been conferred upon it. The concluding phrase of the Natural Gas Act **[Title 15, Section 717f(h), USCA]** "or in the State Courts" merely grants permission for utilization of state-created machinery. This was clearly stated in **Sigue v. Texas Gas Transmission Corporation** (D. C. W. D. La.), 235 F. Supp. 155, affirmed 5 Cir., 354 F. 2d 40, thus:

"The state merely furnished the forum and the procedure."

In the instant case the State of Georgia has furnished the **authority**, the forum, and the procedure . . . obviously what Congress never intended.

II

The Decisions of This Court Have Been Ignored

The decision of the Fifth Circuit Court of Appeals is in direct conflict with and completely ignores decisions of this Court interpreting the Natural Gas Act. In **Illinois Natural Gas Co. v. Central Illinois Public Service Co.**, 314 U. S. 498, 62 S. Ct. 384, this Court established that a Certificate of Public Convenience and Necessity is a prerequisite to State Court action. Factually it appeared in that case the Illinois Natural Gas Company owned a pipe line system located wholly in the State of Illinois but whose transmission pipe lines connected at various points in Illinois with the main line of Panhandle Eastern. Central Illinois Public Service Company petitioned and obtained from the Illinois Commerce Commission an order requiring Illinois Natural Gas Company to supply it with natural gas and to establish a pipe line connection necessary for that purpose. The Certificate of Public Convenience and Necessity, provided for under the Natural Gas Act hereinbefore quoted had not been obtained. This Court held:

> "As Congress, by § 7 (a) (c) of the Act has given plenary authority to the Federal Commission to regulate extensions of gas transportation facilities and their physical connection with those of distributors, as well as the sale of gas to them, and **since no certificate of public convenience and necessity, required by § 7 (c), has been granted to appellant** by the Federal Commission for the proposed extensions and sale, **the state commission was without power to order them**". [Emphasis supplied.]

The substantive choice afforded by the decision in the instant case of proceeding under the Georgia statute without first obtaining a Certificate of Convenience and Necessity not only flies in the face of the statutory scheme adopted by Congress but creates serious constitutional implications for, as this Court noted in **Federal Power Commission v. Natural Gas Pipeline Co.**, 315 U. S. 575, 62 S. Ct. 736, 741:

> "The sale of natural gas originating in one state and its transportation and delivery to distributors in any other state constitutes interstate commerce, which is subject to regulation by Congress (cit.)"

Compare—

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U. S. 152, 66 S. Ct. 906;

and

Natural Gas Pipeline of America v. Illinois Commerce Commission, 33 Ill. 2d 214, 210 N. E. 2d 490, recognizing that even the issuance of securities to finance pipeline construction is covered by the Natural Gas Act.

III

The Regulatory Scheme Established by Congress Is Avoided

The Fifth Circuit Court of Appeals in concluding that the Natural Gas Act did not

> ". . . require such a certificate as a condition precedent to the use of the Georgia statute"

cited **Oakland Club v. South Carolina Public Service Commission**, 4 Cir., 110 F. 2d 84, and **Still v. Manufacturers**

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Light and Heat Co., 39 F. P. C. 323, in support of such conclusion.

These decisions themselves conflict with the specific language of the Natural Gas Act, as well as decisions of this Court hereinbefore noted. To demonstrate the erosion occasioned by this line of authority, Petitioners need do no more than invite attention to this Court's emphatic language in **Federal Power Commission v. Hope Natural Gas Co.**, 320 U. S. 591, 612, 64 S. Ct. 281, 291-292:

> "The Federal Power Commission was given broad powers of regulation.
>
> * * * * * * *
>
> By § 7 (b) it was given control over the abandonment of facilities or of service. And by § 7 (c), as originally enacted, **no natural gas company could undertake the construction or extension** of any facilities for the transportation of natural gas to a market in which natural gas was already being served by another company, or sell any natural gas in such a market, **without obtaining a** certificate of public convenience and necessity from the Commission." [Emphasis supplied.]

Congress obviously intended that interstate pipeline carriers assume definite responsibilities. This Court noted certain of same in the **Hope Natural Gas Case**, supra:

> "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the Kansas Natural Gas Co. case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep., No. 709, supra, p. 3. More-

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over, the investigations of the Federal Trade Commission had disclosed that the majority of the pipeline mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were pre-occupied. **Congress addressed itself to those specific evils.**" [Emphasis supplied.]

CONCLUSION

The labors of Congress have been in vain if interstate pipeline carriers, aided by judgments of the District Courts, Circuit Courts of Appeal, and the Federal Power Commission itself, may avoid the provisions of the Natural Gas Act as has here been done.

Respectfully submitted

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